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IN THE

Supreme Court of the United States

KURT H. EICHORN, WILLIAM J. HUCKINS, T. ROGER KIANG, EDWARD W. LANDIS, ORLANDO NAPOLITANO, GILBERT G. DALEY, SUSAN H. DIBONA, BETH KING, MICHAEL S. ORATOWSKI, THOMAS L. SALISBURY, LAWRENCE WALSH, WILLIAM LAWLESS, RUSSELL LEPPALA, GABE P. TOROK, JUDITH B. BRUGNER, KATE HARRIS, CAROLE T. JOHNSON, CHARLES O. LAUGHLIN II, MICHAEL A. MCFARLAND, BARBARA OLIVER, GARY PATTERSON, ROBERT PROULX, WILLIAM J. SCHROTT, ROBERT MICHAEL SHEPHERD, RONALD A. SOKOL, JOSEPH T. SZLASA, DIANE F. TAYLOR, LORRAINE J. WELCH, and MARIE ZEITS, individually and on behalf of all others similarly situated,

Petitioners,

v.

AT&T CORP., LUCENT TECHNOLOGIES INC., TEXAS PACIFIC GROUP, NCR CORPORATION, and THE CIT GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT TEXAS PACIFIC GROUP

DAVID MICHAEL FABIAN
Counsel of Record
CHRISTINE M. GURRY
TRAFLET & FABIAN
264 South Street
Morristown, NJ 07960
(973) 631-6222

Counsel for Respondent Texas Pacific Group

STATEMENT PURSUANT TO RULE 29.6

Respondent Texas Pacific Group's corporate disclosure statement was set forth at page ii of their Brief in Opposition, and there are no amendments to that statement.

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INTRODUCTION

Respondent Texas Pacific Group ("TPG") submits this supplemental brief in accordance with Supreme Court Rule 15(8) in response to the brief of *Amici Curiae* AARP and the National Employment Lawyers Association ("NELA"). AARP and NELA are hereinafter collectively referred to as "*Amici*."

STATEMENT OF THE CASE

TPG respectfully refers the Court to the Statement of the Case set forth in its Brief in Opposition, which it incorporates and adopts herein.

ARGUMENT

I. Amici's Arguments Are Based Upon A Misapprehension Of The Facts Of This Case.

Amici's brief focuses on the purportedly narrow judicial interpretation of § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), following this Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2002), and the alleged attendant limitations on the relief available to claimants under § 510 of ERISA, 29 U.S.C. § 1140. Whether subsequent judicial application of the holdings in *Mertens* and *Great-West* has resulted in an allegedly restrictive interpretation of the equitable relief available under § 502(a)(3) is a hypothetical issue and entirely irrelevant to the case at hand. Petitioners did not seek equitable relief below and have not suffered the type of wrong that § 510 was designed to prevent. Petitioners have sought only impermissible compensatory damages notwithstanding the fact that no Petitioner lost a single cent of vested pension benefits. This case simply is not the appropriate occasion to define the boundaries of

"appropriate equitable relief" in the context of § 510 cases. Therefore, the Petition should be denied.

A. *Amici*'s Arguments Regarding Reinstatement Are Irrelevant As Reinstatement Has Not Been Requested And Is Not Appropriate.

The fact that *Amici* are unfamiliar with the complex and unique facts of this case is readily apparent in their phrasing of their question presented for resolution, *i.e.*, "whether equitable relief under § 502(a)(3), 29 U.S.C. § 1132(a)(3), includes reinstatement to the plan to become eligible for benefits or the benefits lost due to the employer's illegal actions to interfere with their pension benefits." (*Amici*'s Brief at M-2.) Respondents have never argued, nor has either of the lower courts held, that reinstatement is not a potentially available equitable remedy under § 502(a)(3). Reinstatement, rather, is not an issue in this matter. Petitioners have never sought to be reinstated to their former positions with AT&T Paradyne, nor could they be as AT&T Paradyne has ceased to exist. Petitioners similarly have never sought relief requiring their employment with the Lucent Technologies Inc. ("Lucent"). Petitioners have attempted to characterize the relief that they are seeking as a kind of reinstatement to the Lucent Pension Plan. However, Petitioners have at all times remained vested beneficiaries of the Lucent Pension Plan and will begin receiving their vested pension benefits when they reach pension eligibility under the terms of the Lucent Pension Plan. Therefore, *Amici*'s legal arguments regarding "reinstatement" are irrelevant to the facts of this matter and offer no basis for granting the Petition.

B. *Amici*'s Arguments Regarding Back Pay Cite Superseded Authority.

In *Great-West*, this Court held that back pay is treated as equitable only when it is an integral part of an equitable

remedy, such as reinstatement. *Great-West*, 534 U.S. at 518, n. 4. Back pay, standing alone, constitutes a form of legal, not equitable, restitution and, therefore, is not recoverable under § 502(a)(3). *See* 534 U.S. at 518, n. 4. Nevertheless, *Amici* argue that "nearly every circuit to consider the issue after *Mertens* has held that back pay is an appropriate equitable remedy for a § 510 violation." (*Amici*'s Brief at p. 13.) However, every case cited by *Amici* in support of this argument was decided before this Court's decision in *Great-West*. Following this Court's decision in *Great-West*, courts have uniformly held that back pay by itself is not recoverable under § 502(a)(3). *Millsap v. McDonnell Douglas Corporation*, 368 F.3d 1246 (10th Cir. 2004) (holding that a claim for back pay, without more, is "almost an exemplar of a claim at law" and therefore not recoverable under § 502(a)(3) as equitable relief); *Nicolau v. Horizon Media, Inc.*, 2003 WL 22208356 *2 (S.D.N.Y.), *on reconsid.*, 2003 WL 22852680 (S.D.N.Y.), *rev'd on other grounds*, 402 F.3d 325 (2d Cir. 2005) (rejecting a free-standing claim for back pay under § 502(a)(3)); *De Pace v. Matsushita Elec. Corp. of America*, 257 F.Supp.2d 543, 563 (E.D.N.Y. 2003) (holding that "the Supreme Court's subsequently overly narrow reading of 'equitable relief,' as that term is defined in § 1132(a)(3), appears to foreclose [a] 'make-whole' remedial scheme"); *Bona v. Barasch*, 2003 WL 1395932 *11 (S.D.N.Y.) (holding that free-standing awards of back pay cannot be reconciled with *Great-West*); *Kishter v. Principal Life Insurance Company*, 186 F.Supp.2d 438, 445 (S.D.N.Y. 2002) (holding that the Supreme Court in *Great-West* expressly rejected the arguments that could be used to justify an award of back pay). Thus, *Amici*'s contention that Petitioners are entitled to back pay is unsupported by the weight of authority, and provides no basis for granting the Petition.

C. *Amici*'s Argument That All Coercive Relief Is Equitable Is Incorrect.

In an effort to overcome the fact that Petitioners cannot identify a recognized form of equitable relief, *Amici* argue that all relief involving "coercive elements" is equitable. (*Amici*'s Brief at p. 14.) This is an oversimplification. An order coercing a party to perform or refrain from performing a particular act or acts is equitable. An order coercing a party to pay money is not equitable. *Great-West*, 534 U.S. at 210-11. Here, Petitioners have no need to "coerce" Respondents to act a certain way or to stop acting a certain way because Respondents are not engaging in any activity that presents the threat of future or ongoing harm to the Petitioners. Instead, Petitioners allege that they were harmed by the occurrence of a past event, *i.e.*, the imposition of the Post-Closing Net, and they are seeking compensation for that harm. That is not equitable relief; that is the very definition of compensatory damages.

Amici, nevertheless, contend that Petitioners are seeking coercive relief in the form of an order compelling Respondents "to take certain actions to enable them to become eligible for their bridging rights to determine whether they may obtain benefits under the plan." (*Amici*'s Brief at p. 15.) The specific "actions" are not articulated by *Amici*, which again reflects a lack of understanding of the facts in this case. As previously discussed, Petitioners have never sought an order compelling their employment with Lucent, AT&T or their affiliates. Therefore, reinstatement is not one of the actions that Petitioners seek to compel. The only way other than reinstatement for Petitioners "to become eligible for their bridging rights" would be for the Court to order Respondents to credit Petitioners with service that they never gave and benefits that they never earned. This would constitute a windfall to Petitioners and

would be an inequitable result, contrary to the express terms of § 502(a)(3).

Amici's misapprehension of the facts is further demonstrated by the argument that Petitioners require equitable relief "to enable them to become eligible for their bridging rights." At least three of the Petitioners were hired by Lucent and utilized the bridging provisions of the Lucent Pension Plan to bridge their service time. The remaining Petitioners were never hired by Lucent, AT&T or their affiliates and thus could not make use of the bridging provisions of the Lucent Pension Plan because they did not work for Lucent. Nevertheless, the fact that three of the Petitioners did successfully bridge their periods of service completely undermines *Amici*'s argument that Petitioners were unable to bridge their terms of service. Therefore, *Amici*'s argument does not present a compelling reason for granting the Petition.

D. *Amici* Admit That The Alleged Equitable Relief Sought By Petitioners Is Nothing More Than An Empty Shell When They State That Respondents Could Still Deny Benefits To Petitioners Even After This Supposed Equitable Relief Has Been Granted.

Amici effectively admit the fallacy of their purported equitable relief when they state that "[t]here are many factors that implicate a participant's eligibility for and amount of benefits, including salary and years of service" and that even if Petitioners were awarded the undefined equitable relief, Respondents still "may have adequate reasons to deny the benefit or calculate an amount different than that which the participant believes that he or she is entitled." (*Amici*'s Brief at p. 15.) If Respondents could deny Petitioners the benefits that they seek, then the alleged equitable relief to which *Amici*'s refer (and which

Petitioners did not seek below) is no relief at all; it is a ruse to get around § 502(a)(3)'s prohibition against compensatory damages. Because equity does not require the doing of a vain act, *Crosby v. Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper Co.*, 382 F.3d 587, 597 (6th Cir. 2004), *cert. denied*, 544 U.S. 976 (2005), this Court must see through *Amici*'s argument that some unspecified equitable relief is being demanded by Petitioners and look to the Petitioners repeated admissions below, which permit only one conclusion: Petitioners seek impermissible compensatory damages, which the lower courts properly held were not recoverable under § 502(a)(3).

E. The *Swaback* and *Epright* Cases Cited By *Amici* Do Not Support An Award Of Relief To Petitioners Because They Were Decided Under § 502(a)(1)(B).

Amici maintain that "other courts have ordered defendants to permit participants to meet the eligibility requirements for plan benefits where the defendants have prevented the participants from meeting such requirements . . ." (*Amici*'s Brief at p. 15.) In support of this contention, *Amici* cite *Swaback v. American Info. Techs. Corp.*, 103 F.3d 535 (7th Cir. 1996) and *Epright v. Envtl. Res. Mgmt., Inc. Health & Welfare Plan*, 81 F.3d 335 (3rd Cir. 1996). Neither of these cases involved claims for interference with attainment of benefits. Rather, plaintiffs in those cases were alleging a wrongful denial of benefits to which they claimed they were already entitled under the terms of the plan. Thus, they were not proceeding under § 502(a)(3), but instead under § 502(a)(1)(B). Section 502(a)(1)(B), which is not applicable to § 510, permits awards of both legal and equitable relief and thus does not require an analysis of whether the remedy sought is

appropriate equitable relief, as does § 502(a)(3). *Swaback* and *Epright*, therefore, are completely inapposite to the factual and legal issues presented here and do not present a compelling reason for granting the Petition.

F. The Modifier "Appropriate" Does Not Expand The Scope Of Equitable Relief Available Under § 502(a)(3).

Amici suggest that the use of the word "appropriate" to modify the term "equitable relief" provides a possible avenue to expand the available remedies under § 502(a)(3). In essence, *Amici* argue that Congress intended courts to use § 503(a)(3) flexibly to award relief that is "appropriate" to the nature of the claim being asserted. Under this theory, relief that is appropriate to remedy a § 510 claim might be different than the relief that is appropriate to remedy a breach of fiduciary duty claim. However, the fact that relief must be appropriate does not change the fact that it must also be equitable. The language of the statute does not provide that the remedy must be appropriate *or* equitable; rather, it must be appropriate *and* equitable. Thus, the word "appropriate" must be read not as expanding the scope of equitable relief but as limiting or qualifying it. Accordingly, under the terms of the statute, equitable relief can be awarded only where it is appropriate under the circumstances. This presupposes that there will be instances in which equitable relief may be inappropriate and, therefore, unavailable, which would be the case here, if Petitioners sought equitable relief below.

G. *Mertens* and *Great-West* Control The Analysis Of This Case.

In an effort to avoid their prohibition against compensatory damages, *Amici* argue that *Mertens* and *Great-West* do not control the analysis of this case because this Court was not called upon in those matters to consider appropriate equitable relief in the context of a § 510 claim. *Amici* appear to suggest that § 502(a)(3) should be interpreted differently in redressing § 510 violations than breaches of fiduciary duty (*Mertens*) or claims for reimbursement of benefits to the plan (*Great-West*). If Congress intended § 510 claims to be remedied differently than other provisions of ERISA or if it intended the definition of "appropriate equitable relief" to be more expansive for § 510 plaintiffs, it could have created a remedial provision especially for § 510, as it did for other causes of action. For example, § 502(a)(1)(A), 29 U.S.C. § 1132(a)(1)(A), provides the remedy for a violation of § 502(c), 29 U.S.C. § 1132(c), and § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides the remedy for a violation of § 409, 29 U.S.C. § 1109. The fact that Congress did not draft a remedial provision exclusively for § 510 demonstrates Congress' intent that the term "appropriate equitable relief" be applied uniformly regardless of the nature of the underlying claim for relief.

H. Petitioners Have Not Suffered The Wrong That § 510 Was Designed To Prevent.

Amici argue that § 510 of ERISA is intended to protect employees who have been *wrongfully terminated* by their employers in order to prevent pension benefits from *vesting*. (*Amici*'s Brief at p. 5 (quoting *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 143 (1990)). The most common remedy for a plaintiff who satisfies the elements of a claim under § 510 is an order compelling the employer to reinstate

the plaintiff so that he or she may attain eligibility for vested pension benefits. Petitioners, however, have not suffered the wrong that § 510 was designed to prevent. That is the reason why they have never been able to articulate a demand for reinstatement or any other form of equitable relief under § 510's corresponding enforcement provision, § 502(a)(3).

Petitioners were not wrongfully terminated. Petitioners' employment with AT&T Paradyne was terminated upon the sale of that business entity. Moreover, Petitioners did not lose any of their vested pension benefits. Petitioners held vested benefits in the Lucent Pension Plan at the time of the sale, and none of those benefits was lost as a result of the sale. Instead, Petitioners allege that they were deprived of enhanced pension benefits because they "lost the right" to bridge their period of service. Assuming, *arguendo*, that bridging was a "right" under the Lucent Pension Plan, a fact which Respondents do not concede, the contention that the Post-Closing Net "destroyed bridging rights" is completely disproven by the fact that three of the Petitioners were, in fact, employed by Lucent and bridged their terms of service for purposes of service pension eligibility. Because the Petitioners did not suffer the harm that § 510 was designed to prevent, this case does not offer the appropriate setting in which to address the scope of equitable relief available to § 510 plaintiffs.

I. The Wrongful Termination Provision Of § 510 Of ERISA Should Not Be Interpreted The Same Way As Wrongful Termination Provisions Under Employment Discrimination Statutes.

Amici argue that § 510, as the wrongful termination provision of ERISA, must be interpreted consistently with wrongful termination provisions in other statutes, such as Title VII of the Civil Rights Act of 1964 ("Title VII"),

42 U.S.C. § 2000e-2, and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3), which do not limit relief to equitable remedies. (*Amici*'s Brief at pp. 9-13.) This argument ignores the fact that ERISA is not a make-whole statute, like Title VII and the NLRA. Title VII and the NLRA were intended to provide the employee with complete protection from discriminatory practices. *Millsap v. McDonnell Douglas Corporation*, 368 F.3d 1246, 1259 (10th Cir. 2004). In passing Title VII and the NLRA, Congress had no competing interest with which to be concerned, nor did Congress have to worry that Title VII and the NLRA would have a chilling effect on employment. In passing ERISA, however, Congress tried to balance the competing interests of safeguarding employee benefits and containing pension costs. *Mertens*, 508 U.S. at 262-63. Congress did not want to so burden pension plans with concerns about litigation expenses that it discouraged employers from offering the plans in the first place. *Id.* Consequently, ERISA, which is primarily concerned with protecting the funds of the plan, does not offer relief to every individual plaintiff. *Mertens*, 508 U.S. at 262; *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 142 (1985). Thus, it is understood and accepted that certain individual plaintiffs can be left without a remedy under § 510 of ERISA. Petitioners fall within that category. As TPG noted in its Brief in Opposition to the Petition, if ERISA is to be turned into a make-whole statute, "it is for Congress to undertake that task," not the courts. *Millsap*, 368 F.3d at 1260.

CONCLUSION

For the reasons set forth herein and in its Brief in Opposition to the Petition for a Writ of Certiorari, Respondent Texas Pacific Group respectfully requests that the Petition be denied.

Respectfully submitted,

DAVID MICHAEL FABIAN
Counsel of Record
CHRISTINE M. GURRY
TRAFLET & FABIAN
264 South Street
Morristown, NJ 07960
(973) 631-6222
Counsel for Respondent
Texas Pacific Group